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## SMITH v. WITHROW.

April 6, 1921.

[106 S. E. 694.]

**1. Appeal and Error (§§ 525 (1), 528 (4)\*)—Instruction or Affidavits Must Be Included in the Record, to Be Available on Appeal.**—Matters, such as instructions or affidavits used on new trial, if sought to be availed of on appeal, must be made parts of the record by proper bills of exceptions.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581.]

**2. Appeal and Error (§ 933 (5)\*)—Presumed that Affidavits Not in Record on Which New Trial Was Ordered Were Sufficient.**—In the absence of affidavits on which the trial court relied in setting aside the jury's verdict, this court must presume that the verdict was properly set aside, and where the plaintiff tendered no evidence on the second trial the final judgment of the court therein must be affirmed.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 609.]

**3. Appeal and Error (§ 708 (3)\*)—Matter Depending on Affidavits Cannot Be Reviewed in Their Absence.**—A complaint that a verdict on a first trial should not have been set aside, save as to the recovery for personal injuries to which the affidavits for new trial related, cannot be reviewed, in the absence of such affidavits.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581.]

Error to Circuit Court of City of Newport News.

Action by G. W. Smith against C. S. Withrow. Verdict for plaintiff, motion for new trial sustained, judgment on second trial for the defendant, and the plaintiff brings error. Affirmed

*T. J. Christian*, of Newport News, for plaintiff in error.

*Lett & Massie*, of Newport News, for defendant in error.

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GREAT ATLANTIC & PACIFIC TEA CO. v. COFER.

April 6, 1921.

[106 S. E. 695.]

**1. Landlord and Tenant (§ 53 (2)\*)—Lessee's Rights Not Affected by Erroneous Acknowledgment of Receipt of Subsequently Returned Check for Rent.**—A lessee's rights under lease as against innocent purchaser were not affected by the erroneous acknowledgment of receipt of lessee's subsequently returned check by employee of purchaser's agent who had been instructed not to accept check from lessee for rent.

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\*For other cases see same topic and KEY-NUMBER in all Key Numbered Digests and Indexes.